

LIFE IS GOOD, INC. V. LG ELECTRONICS U.S.A., INC
Civil Action No. 04 11290 WGY

DECLARATION OF TIMOTHY LEMPER IN SUPPORT OF DEFENDANTS' MOTION IN LIMINE
TO STRIKE PLAINTIFF'S EVIDENCE OF ALLEGED CONFUSION

Exhibit 5

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eldRptr

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1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MASSACHUSETTS

3 - - - - - x

4 LIFE IS GOOD, INC.,

5 Plaintiff, Civil Action

6 vs. No. 04-cv-11290-REK

7 LG ELECTRONICS, U.S.A., INC.,

8 LG ELECTRONICS MOBILECOMM

9 U.S.A., INC., (formerly

10 LG INFOCOMM U.S.A., INC.),

11 Defendants.

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13 RULE 30(b)(6) VIDEOTAPED DEPOSITION of Life is

14 good., Inc., represented by Albert A. Jacobs, a

15 witness called by and on behalf of the Defendants,

16 taken pursuant to the provisions of the Federal

17 Rules of Civil Procedure, before Dana Welch, a

18 Registered Professional Reporter and Notary Public

19 in and for the Commonwealth of Massachusetts, at the

20 offices of Finnegan, Henderson, Farabow, Garrett

21 & Danner, LLP, on Thursday, October 13, 2005,

22 commencing at 9:36 a.m.

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1 A Met with my counsel and received some general 09:42:04
2 advice. 09:42:07
3 MR. KIRBY: Don't go into any of the 09:42:09
4 specifics of the advice. 09:42:11
5 THE WITNESS: Right. 09:42:12
6 BY MR. SOMMERS: 09:42:14
7 Q Mr. Jacobs, in looking at the various topics that 09:42:14
8 are scheduled for the deposition today, did you 09:42:21
9 take any actions to educate yourself on any of 09:42:28
10 those subjects? 09:42:31
11 A No. 09:42:32
12 Q Did you take -- did you discuss with anybody other 09:42:32
13 than your attorney about the subject matter that 09:42:38
14 are noticed in this deposition? 09:42:41
15 A Yes. 09:42:43
16 Q Who was that? 09:42:44
17 A Some business associates. 09:42:46
18 Q And what are their names? 09:42:48
19 A Shawn White. And I guess I would clarify that. I 09:42:51
20 believe the only communication was e-mail, so I 09:42:56
21 don't know if that qualifies as discussion. But 09:42:59
22 Shawn White, who is one of our national sales 09:43:02

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1 managers; Rich Cremin, who is also a national sales 09:43:06
2 manager for Life is good.; Roy Heffernan, who is 09:43:10
3 the COO at Life is good,, and my brother, John, who 09:43:14
4 is my partner and co-owner of Life is good. 09:43:23
5 Q Anyone else? 09:43:27
6 A I don't think so. 09:43:28
7 Q With Mr. White, what was the nature of your 09:43:29
8 discussions? 09:43:34
9 A I believe that I asked Shawn for specifics on areas 09:43:35
10 of confusion that he recollected. 09:43:48
11 Q Any other subjects? 09:43:51
12 A I don't think so. 09:43:57
13 Q Mr. Cremin? 09:43:58
14 A Same. Actually, all of this would be under one 09:44:01
15 e-mail that -- that came from my brother, John, and 09:44:04
16 that I was copied on. 09:44:08
17 Q Okay. All right. And this is -- this e-mail all 09:44:09
18 related to these individuals of instances of 09:44:14
19 confusion? 09:44:17
20 A Yes. 09:44:18
21 Q Was there any other subject discussed? 09:44:18
22 A I don't think so. 09:44:21

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1 Q Do you have a copy of that e-mail? 09:44:22

2 A I do not. 09:44:24

3 MR. SOMMERS: We would ask that it be 09:44:26

4 produced. 09:44:29

5 BY MR. SOMMERS: 09:44:31

6 Q Can you tell me the general subject matter of the 09:44:31

7 e-mail? 09:44:33

8 A The general subject matter? 09:44:34

9 Q Yes. 09:44:36

10 A I believe I already did. 09:44:37

11 Q And it was generally about confusion? 09:44:38

12 A That's right. 09:44:40

13 Q Do you have any specific recollection of what was 09:44:41

14 said? 09:44:43

15 A No. I think that's -- about tells it. 09:44:43

16 Q Okay. And what was the purpose of the e-mail? 09:44:48

17 A To -- to find out their knowledge about confusion 09:44:52

18 that they had experienced. 09:44:58

19 Q Did you have any telephone discussions with them? 09:45:03

20 A Not Cremin, not White, not Heffernan, and not -- 09:45:07

21 no, I didn't; perhaps my brother, but I don't 09:45:19

22 specifically recollect. 09:45:22

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| 1 | Q | Well, let's go into -- into the nature of those | 09:45:23 |
| 2 | | discussions or the e-mail. Did you receive a | 09:45:27 |
| 3 | | response to your e-mail from any of these | 09:45:31 |
| 4 | | individuals? | 09:45:34 |
| 5 | A | Yes. | 09:45:34 |
| 6 | Q | Who did you receive responses from? | 09:45:35 |
| 7 | A | All of them. | 09:45:39 |
| 8 | Q | Okay. And were the responses by e-mail? | 09:45:40 |
| 9 | A | Yes. | 09:45:44 |
| 10 | | MR. SOMMERS: Okay. We could ask that | 09:45:46 |
| 11 | | copies of those documents be produced. | 09:45:48 |
| 12 | | BY MR. SOMMERS: | 09:45:51 |
| 13 | Q | Specifically, what was the response that Mr. White | 09:45:52 |
| 14 | | gave you? | 09:46:00 |
| 15 | A | To be honest, I didn't see all the -- all the | 09:46:01 |
| 16 | | individual responses; I saw a summary of them put | 09:46:06 |
| 17 | | together by my brother. | 09:46:09 |
| 18 | Q | And what form was the summary? | 09:46:11 |
| 19 | A | What form was the summary? | 09:46:15 |
| 20 | Q | Was it in writing? | 09:46:20 |
| 21 | A | It was in writing. | 09:46:22 |
| 22 | | MR. SOMMERS: I'd ask that a copy of that | 09:46:24 |

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1 document be produced. 09:46:26

2 BY MR. SOMMERS: 09:46:28

3 Q Are there any of the documents that Mr. White, 09:46:30

4 Mr. Cremin, Mr. Heffernan and your brother sent 09:46:36

5 about instances of confusion that you saw 09:46:39

6 individually, aside from the summary that your 09:46:43

7 brother John prepared? 09:46:46

8 A Could you repeat that question, please? 09:46:48

9 Q Absolutely. 09:46:50

10 Did you look at the various e-mails you 09:46:52

11 received from Mr. White, Mr. Cremin and 09:46:56

12 Mr. Heffernan (sic) and Mr. -- 09:46:59

13 MR. KIRBY: Heffernan. 09:47:02

14 MR. SOMMERS: Heffernan. Thank you. 09:47:04

15 THE WITNESS: Heffernan, yeah. 09:47:06

16 No. As I stated, I did not. To repeat, 09:47:07

17 I did not look at the individual, but I looked at a 09:47:10

18 summary. 09:47:12

19 BY MR. SOMMERS: 09:47:12

20 Q Okay. 09:47:12

21 A I mean, I likely was copied on all of them, but I 09:47:13

22 just can't get to my e-mail every day. 09:47:16

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1 Q And do you recall what the summary said? 09:47:18
2 A Yes. It indicated there were several instances of 09:47:19
3 confusion. 09:47:24
4 Q Okay. Can you tell me specifically what those are? 09:47:24
5 A I couldn't -- I couldn't cover all of them, but I 09:47:27
6 could probably name a few. 09:47:32
7 Q I'd like -- 09:47:34
8 A Would you like me to proceed? 09:47:37
9 Q I'd like you to proceed. 09:47:39
10 A Okay. In one case, Shawn White indicated that a 09:47:41
11 neighbor of his -- a neighbor of his said, "I saw 09:47:47
12 your ad for "life's good," isn't that your 09:47:54
13 company?" And Shawn -- Shawn indicated that 09:47:58
14 although he corrected the gentleman, that that was 09:48:02
15 not our company, it was an ad for electronics, that 09:48:06
16 later, he remained confused and still asked him 09:48:11
17 how's things at life's good; that was one instance. 09:48:16
18 Another involved -- involved a sales rep 09:48:22
19 of Shawn's who mentioned a consumer who was 09:48:27
20 shopping at Best Buy and asked about a 09:48:32
21 refrigerator. And the person said, "That 09:48:37
22 refrigerator is made by Life is good." And the 09:48:40

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1 neighbor asked this sales rep, whose name is Susan 09:48:44
2 deMarco, asked this sales rep, "When did these guys 09:48:49
3 get involved in appliances?" 09:48:56
4 Q Any others? 09:49:01
5 A Let's see. Yeah, there's another one. One that 09:49:03
6 came in from Roy Heffernan was a recollection of a 09:49:08
7 consumer coming into our flagship retail store on 09:49:12
8 Newbury Street in Boston and saying, "I'm confused. 09:49:17
9 I -- I don't know what Life is good.is. I saw a 09:49:24
10 billboard in New York City, and -- and I see this 09:49:28
11 store; is it all related?" 09:49:35
12 "What else? Rich Cremin sent information 09:49:37
13 from someone he knows, I believe it's a nephew of 09:49:52
14 his, who sent an e-mail to him asking for 09:50:00
15 clarification about what LG is and saying, "Do you 09:50:03
16 -- do you know these guys" -- I believe he used the 09:50:09
17 wrong terminology and he said, "Do you know these 09:50:11
18 guys are using or stealing your copyright?" 09:50:14
19 My brother added on the list that his 09:50:23
20 neighbor made a comment about his air conditioner 09:50:27
21 and wondered if -- if our company had produced it. 09:50:34
22 I think that's all I can remember. 09:50:44

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1 Q Okay. 09:50:46

2 A But by no means does that mean that's complete on 09:50:47

3 what the summary was. 09:50:50

4 Q Do you understand that part of the topics that are 09:50:51

5 covered in this deposition was to be able to 09:51:00

6 identify all instances of confusion? 09:51:02

7 A I understand. But it was also my understanding 09:51:05

8 that, you know, if I couldn't recollect all of 09:51:08

9 them, and certainly it would be impossible from my 09:51:14

10 perspective to recollect all of them, it's very 09:51:18

11 common for there to be confusion and we hear it 09:51:21

12 quite often. So -- 09:51:24

13 Q Well, let's go back over these and I will -- I will 09:51:27

14 return to that last comment. 09:51:35

15 Mr. Heffernan -- 09:51:38

16 MR. KIRBY: Jacobs. 09:51:42

17 MR. SOMMERS: Oh, thank you. 09:51:45

18 BY MR. SOMMERS:

19 Q Mr. -- Mr. John Jacobs -- 09:51:46

20 A Bert Jacobs. 09:51:48

21 MR. KIRBY: I think we're all talking 09:51:51

22 past each other. Let him -- let him finish. 09:51:53

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| 1 | MR. SOMMERS: Yeah. | 09:51:55 |
| 2 | BY MR. SOMMERS: | 09:51:56 |
| 3 Q | You indicated that the last instance of confusion, | 09:51:57 |
| 4 | which was your brother, John; am I correct? | 09:52:01 |
| 5 A | That's right. | 09:52:03 |
| 6 Q | And that's John Jacobs? | 09:52:04 |
| 7 A | Yes. | 09:52:06 |
| 8 Q | Okay. And you've told me that a neighbor of his | 09:52:06 |
| 9 | asked him about an air conditioner. | 09:52:10 |
| 10 A | Yeah. | 09:52:11 |
| 11 Q | Okay. Now, who is -- who is the individual that is | 09:52:12 |
| 12 | John Jacobs' neighbor? | 09:52:17 |
| 13 A | I don't know. Let me think of this guy. I've met | 09:52:24 |
| 14 | him once. I can't think of his name. | 09:52:27 |
| 15 Q | Okay. | 09:52:28 |
| 16 A | He lives -- he shares a -- I mean, lives in a | 09:52:29 |
| 17 | condominium, above or beneath him. | 09:52:32 |
| 18 Q | Now, what specifically did he say? | 09:52:35 |
| 19 A | I know only what I told you. | 09:52:37 |
| 20 Q | And what exactly do you recall -- | 09:52:41 |
| 21 A | Want me to repeat what I -- | 09:52:48 |
| 22 Q | Please. | 09:52:51 |

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1 A -- said? 09:52:51

2 He pointed to an air conditioner, which I 09:52:53

3 believe was an LG air conditioner, and questioned 09:52:55

4 in some fashion if our company had produced it or 09:52:58

5 something along that -- those lines. 09:53:02

6 Q Okay. Did he indicate why he believed that? 09:53:04

7 A I don't specifically recollect, no. 09:53:10

8 Q Okay. Did he purchase the air conditioner 09:53:15

9 believing it was produced by -- 09:53:19

10 A I don't know. 09:53:22

11 MR. KIRBY: Let him finish. 09:53:30

12 BY MR. SOMMERS: 09:53:32

13 Q Did he indicate any reason why he drew this 09:53:32

14 connection? 09:53:35

15 A He may have, but I wasn't present. 09:53:35

16 Q And this was with your brother, John? 09:53:38

17 A That's correct. 09:53:41

18 Q Okay. Rich Cremins (sic) -- 09:53:41

19 MR. KIRBY: Cremin, C-R-E-M-I-N. 09:53:49

20 BY MR. SOMMERS: 09:53:53

21 Q Mr. Cremin, specifically what did his nephew say to 09:53:53

22 him about -- about the alleged instance of 09:54:00

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1 confusion? 09:54:04

2 A Again, the communication wasn't directly with me. 09:54:07

3 And I only read a summary. So basically, again, 09:54:10

4 what I've stated is all that I know, that he asked 09:54:14

5 the question or he asked for some clarification 09:54:17

6 about LG and indicated that -- I think he asked the 09:54:20

7 question, "Are you guys aware that these guys are 09:54:25

8 using your copyright?" And I think that was it. 09:54:27

9 Q Okay. 09:54:31

10 A There may have been more to it. But in the 09:54:31

11 summary, I think that's all I can recall. 09:54:34

12 Q All right. But he wasn't confused as a purchaser, 09:54:37

13 purchasing any products from LG, believing they are 09:54:42

14 from Life is good.? 09:54:46

15 A I don't know if he was or wasn't. 09:54:47

16 Q All you know is he indicated LG was stealing your 09:54:48

17 copyright? 09:54:52

18 A That's right. 09:54:53

19 Q Okay. And I take it your nephew knows where Mr. -- 09:54:53

20 or let me strike that. 09:54:59

21 I take it that Mr. Cremin's nephew knows 09:55:00

22 where Mr. Cremin works? 09:55:04

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1 A Yes. I think that's why he sent him the 09:55:05
2 information. 09:55:08
3 Q Not that he was confused? 09:55:08
4 A I don't know that. 09:55:10
5 MR. KIRBY: Object to form. 09:55:12
6 BY MR. SOMMERS: 09:55:14
7 Q You don't know whether he was confused or not? 09:55:15
8 A That's correct. 09:55:17
9 Q Mr. Heffernan, specifically, did he identify the 09:55:17
10 context in which this consumer allegedly claimed 09:55:35
11 they were confused? 09:55:41
12 A Basically. He said that a consumer walked into our 09:55:42
13 flagship store and immediately approached a 09:55:49
14 salesperson and asked the question, as stated 09:55:54
15 before. They stated -- she stated that she was 09:55:59
16 confused and wanted to know what relation this 09:56:03
17 store and these products had to do with this 09:56:08
18 billboard in New York City. 09:56:10
19 Q Okay. Did Mr. Heffer -- Heffernan speak directly 09:56:13
20 to the consumer? 09:56:18
21 A No. 09:56:19
22 Q This was relayed to him by a salesperson at your 09:56:19

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1 New York City, and the store that they were in. I 09:57:35
2 believe that the woman looked at what was in the 09:57:39
3 store and it didn't line up with what she thought 09:57:42
4 was on the billboard and wondered about the 09:57:45
5 connection because of the similarities of the words 09:57:48
6 "life is good" and the words "life's good." 09:57:50
7 BY MR. SOMMERS: 09:57:53
8 Q And did anybody from your company specifically 09:57:54
9 discuss this with the alleged consumer who was 09:57:58
10 confused? 09:58:03
11 A Yes. 09:58:04
12 Q And who is that? 09:58:05
13 A Her name is Cat. I may get the name slightly wrong 09:58:07
14 here, Cat McGrady, McGurdy. I don't know. Her 09:58:12
15 last name slips my mind right now, but it's close 09:58:22
16 to that. 09:58:25
17 Q And did you personally talk to her? 09:58:26
18 A I did not. 09:58:30
19 Q This is Mr. Heffernan, correct? 09:58:31
20 A I'm sorry? 09:58:34
21 MR. KIRBY: That spoke with her, that 09:58:35
22 spoke with Ms. McGrady? 09:58:37

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1 MR. SOMMERS: Yes. 09:58:39

2 THE WITNESS: I assume that Roy Heffernan 09:58:40

3 spoke with her, but I don't know that. 09:58:41

4 BY MR. SOMMERS: 09:58:43

5 Q Okay. I guess Mr. Heffernan relayed this 09:58:43

6 information to you? 09:58:46

7 A He relayed the information in response to my 09:58:47

8 brother's e-mail and request, as previously 09:58:50

9 discussed. And I read it on the summary, as 09:58:53

10 previously discussed. 09:58:57

11 Q Okay. Are there any documents that were recorded 09:58:58

12 at the time, memorializing this alleged instance of 09:59:02

13 confusion? 09:59:07

14 A I don't believe so, but I don't know that. 09:59:07

15 MR. SOMMERS: We would ask that those be 09:59:10

16 produced. 09:59:12

17 BY MR. SOMMERS: 09:59:13

18 Q Did the consumer indicate specifically why she was 09:59:26

19 confused? 09:59:29

20 A Yes. Because she saw a billboard and she didn't 09:59:31

21 feel as though that billboard represented the same 09:59:40

22 feel she got in the store. 09:59:45

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1 Q Did anybody from your company confirm that with 09:59:46
2 her? 09:59:55
3 A I assume that the sales clerk -- actually, let 09:59:55
4 me -- I'm confused about the question. Confirm 10:00:00
5 what? 10:00:08
6 Q What you've just testified, as to what your -- let 10:00:08
7 me -- let me strike that. 10:00:11
8 Did you -- let me strike that. 10:00:12
9 Did anybody from your company 10:00:20
10 specifically speak with the customer and confirm 10:00:21
11 your prior testimony as to the reason for her 10:00:25
12 confusion? 10:00:32
13 MR. KIRBY: Object to the form. You can 10:00:35
14 try to answer it, Bert. 10:00:40
15 THE WITNESS: I believe that the sales 10:00:42
16 clerk did have a conversation, which was a 10:00:44
17 confirmation of the woman's confusion as stated. 10:00:48
18 BY MR. SOMMERS: 10:00:51
19 Q And we don't -- does anybody at your company know 10:00:52
20 the identity of the consumer? 10:00:55
21 A Possibly. I'm -- I'm not sure. 10:00:57
22 Q And who would be the individual that would know 10:01:00

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| 1 | that? | 10:01:03 |
| 2 A | Cat, Cat M. | 10:01:04 |
| 3 Q | And in preparing for various discovery requests in | 10:01:10 |
| 4 | this case, did anybody take any steps to discuss | 10:01:16 |
| 5 | this particular instance of confusion with Cat? | 10:01:22 |
| 6 A | I don't know. | 10:01:27 |
| 7 Q | You testified earlier that you believe she saw the | 10:01:28 |
| 8 | billboard and it didn't have the same feel as the | 10:02:15 |
| 9 | store. Am I accurately summarizing your testimony? | 10:02:19 |
| 10 A | Yes. | 10:02:26 |
| 11 Q | What specifically, if you know, did she say about | 10:02:26 |
| 12 | the feel of the billboard as opposed to the store? | 10:02:44 |
| 13 A | I don't know. | 10:02:47 |
| 14 Q | But it is your understanding that this individual | 10:02:48 |
| 15 | did make a distinction between the feel of the | 10:02:59 |
| 16 | billboard sign and the -- your flagship store? | 10:03:02 |
| 17 A | I only know that she was confused. So I probably | 10:03:11 |
| 18 | make some assumptions as to why she was confused. | 10:03:13 |
| 19 Q | And would it be correct that you're also assuming | 10:03:16 |
| 20 | that she was confused? | 10:03:24 |
| 21 | MR. KIRBY: Object to form. | 10:03:26 |
| 22 | THE WITNESS: No. That would not be | 10:03:27 |

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1 correct. She stated that she was confused; so I 10:03:28
2 think it goes quite a bit further. She started by 10:03:30
3 saying, "I'm confused," as I understand it. 10:03:33
4 BY MR. SOMMERS: 10:03:36
5 Q Okay. I understand that. What was she confused 10:03:36
6 about? 10:03:41
7 A All I know is that she mentioned that she's 10:03:41
8 confused, that she saw a billboard in New York 10:03:43
9 City, apparently with "life's good" on it. And she 10:03:47
10 walked into our store and saw the name of our store 10:03:49
11 and our products Life is good. and she stated that 10:03:52
12 she was confused. I don't know a whole lot beyond 10:03:55
13 that. 10:03:58
14 Q Thank you. 10:03:59
15 You indicated that there was an instance 10:04:08
16 involving Mr. White and one of his neighbors. Can 10:04:12
17 you specifically recall that instance for me? 10:04:20
18 A Again, this is secondhand, so I wasn't present. My 10:04:24
19 information comes from a summary that was a return 10:04:30
20 to a request where have you -- can you give 10:04:35
21 specifics on -- on instances of confusion. 10:04:39
22 Given that, I believe that a neighbor of 10:04:44

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1 Shawn White's or a friend or associate of somebody 10:04:49
2 that he knew in his town said to him, "I saw your 10:04:52
3 ad for life's good; that's your company, isn't it," 10:04:59
4 something along those lines, may have mentioned the 10:05:04
5 products. Shawn said that he clarified to the 10:05:07
6 gentleman that, no, in fact, that was not our 10:05:10
7 company. But that later, he continued to be 10:05:13
8 confused and said, "How is business at life's 10:05:17
9 good." 10:05:22
10 Q And how do you know this is an advertisement for 10:05:23
11 LG? 10:05:29
12 A Ask that question again, please. 10:05:29
13 Q How -- how did -- do you know that that particular 10:05:32
14 advertisement was an advertisement for LG? 10:05:36
15 A I think that he described the -- the advertisement 10:05:39
16 to Shawn. 10:05:51
17 Q Okay. Am I correct that you can't answer exactly 10:05:52
18 what the discussion was between the neighbor and 10:05:57
19 Mr. Shawn White? 10:05:59
20 A You are correct. 10:06:00
21 Q Okay. So it is possible, is it not, that the 10:06:01
22 neighbor might have seen an ad from any company 10:06:23

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1 which led to this alleged instance of confusion? 10:06:30

2 A I think it's highly unlikely. 10:06:34

3 Q But it's possible, correct? 10:06:37

4 A Well, yes. But I say it's highly unlikely because 10:06:39

5 I've never seen an ad that says "life's good" for 10:06:43

6 any company except LG. 10:06:46

7 Q Okay. Ever? 10:06:48

8 A Ever. 10:06:52

9 Q Okay. Are you familiar with your policing 10:06:53

10 activities? 10:07:00

11 A To a certain extent, yes. I mean, we have legal 10:07:02

12 counsel that handles those matters, but -- 10:07:06

13 Q Are you aware that -- aware of any third party who 10:07:09

14 has ever used the words "life's good" or "life is 10:07:16

15 good" in any advertisement? 10:07:21

16 A Yes. 10:07:24

17 Q And who is that? 10:07:25

18 A Specifically, I remember Miller Beer using the ad 10:07:27

19 campaign "life is good" for a short period of time. 10:07:37

20 Q Anyone else? 10:07:40

21 A I'm sure there have been others, but I don't 10:07:41

22 specifically recollect. 10:07:45

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1 Q Let's return to your instance of alleged confusion 10:07:53
2 involving the sales representative, and I believe 10:07:56
3 her name is Susan deMarco. Can you tell me 10:08:01
4 specifically what this alleged instance involved? 10:08:05
5 A I will again repeat what I said before. I'm not 10:08:09
6 sure what -- what it is that's new we're looking 10:08:16
7 for in it. 10:08:21
8 But I'm not sure who the woman is or what 10:08:21
9 association she has with Susan deMarco, but she 10:08:24
10 stated that she was shopping for, I believe, a 10:08:27
11 refrigerator, some kind of appliance, and she asked 10:08:30
12 about a specific refrigerator or appliance and the 10:08:34
13 sales clerk said, "That that is made by Life is 10:08:40
14 good." And this person who knows Susan remarked to 10:08:42
15 her something along the lines of, you know, "When 10:08:48
16 did these guys get involved with appliances?" 10:08:50
17 Q And who was she referring to? 10:08:52
18 A I'm sorry? 10:08:56
19 Q Who was she referring to, "these guys"? 10:08:57
20 A Oh, she was referring to Life is good., the 10:09:00
21 company, because she had the knowledge that Susan 10:09:02
22 is a sales rep for Life is good. 10:09:05

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1 Q So she knew Susah was a sales rep of Life is good. 10:09:07
2 and was bringing something to her attention? 10:09:12
3 A That's correct. 10:09:14
4 Q Did she get the -- the name of the individual who 10:09:15
5 allegedly made this statement? 10:09:24
6 MR. KIRBY: The "she" there being Susan? 10:09:26
7 MR. SOMMERS: Correct. 10:09:30
8 THE WITNESS: Yeah. I -- I don't know. 10:09:30
9 I'm sorry. Did she get the name? I saw the name 10:09:31
10 in the summary of the woman who said this. I don't 10:09:33
11 know if the woman has the sales clerk's name at the 10:09:37
12 appliance store, if that's what your question was. 10:09:43
13 BY MR. SOMMERS: 10:09:46
14 Q Okay. And who uttered this alleged instance of 10:09:46
15 confusion; was it the sales clerk or was it a 10:09:50
16 consumer? 10:09:53
17 A I'm not clear which person you're looking for, the 10:09:54
18 person who told Susan about her experience at the 10:09:59
19 appliance store or the sales clerk themselves? I 10:10:02
20 don't know the sales clerk's name. That doesn't 10:10:06
21 say that the woman or Susan doesn't know the name; 10:10:11
22 but I don't know it. And Susan certainly has this 10:10:14

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1 woman's name, but I don't know it. 10:10:17

2 Q I guess what I'm trying to find out is who is the 10:10:20

3 person that was allegedly confused? 10:10:24

4 MR. KIRBY: Well, it assumes that it was 10:10:26

5 only one or the other; so I object to the form of 10:10:28

6 the question. 10:10:32

7 MR. SOMMERS: Fair enough. 10:10:33

8 BY MR. SOMMERS: 10:10:34

9 Q Are there one or more? 10:10:34

10 A I would say that the sales clerk is confused; the 10:10:36

11 consumer, who I don't have her name, is confused. 10:10:41

12 But we can get that name for you. And the only one 10:10:45

13 who wasn't confused in this instance, I think, was 10:10:50

14 Susan; might have been a little ticked off, but she 10:10:53

15 wasn't confused. 10:10:57

16 MR. SOMMERS: All right. I would ask for 10:11:01

17 disclosure of those names. 10:11:03

18 BY MR. SOMMERS: 10:11:05

19 Q Any other instances? 10:11:06

20 A From the summary, you're looking for instances? 10:11:07

21 Q Yes. 10:11:16

22 A I don't recollect. As I stated before, that these 10:11:17

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1 type of instances are -- are many and often. So 10:11:21
2 from each of these people, there are examples, but 10:11:25
3 by no means complete lists. 10:11:29
4 Actually, one -- one just occurred to me 10:11:31
5 that I included on the list, I think, on the 10:11:33
6 summary. I had a gentleman recently say to me -- I 10:11:35
7 don't know his last name, but his name is Dave. 10:11:40
8 Dave said to me, "Jen" -- a mutual friend of 10:11:44
9 ours -- "told me that you're the Life is good. guy, 10:11:51
10 that you own the Life is good. company." And I 10:11:54
11 said, "Yes." And he said, "That's great, man. I 10:11:56
12 have one of your phones," and he took out the 10:11:59
13 phone. 10:12:01
14 Q This individual spoke directly to you? 10:12:08
15 A That's correct. 10:12:10
16 Q And his name is Dave? 10:12:11
17 A That's correct. 10:12:12
18 Q And you don't know his name? 10:12:13
19 MR. KIRBY: Last name? 10:12:15
20 THE WITNESS: I don't know his last name? 10:12:16
21 BY MR. SOMMERS: 10:12:17
22 Q Correct. 10:12:18

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1 A Yeah. 10:12:18

2 Q And did he indicate why he believed you made a 10:12:18

3 phone? 10:12:26

4 A He did not. 10:12:26

5 Q He didn't indicate whether it was because of use of 10:12:27

6 "life's good" or the fact that the phone itself was 10:12:35

7 manufactured by LG or any indication of what 10:12:44

8 prompted this comment? 10:12:47

9 A He didn't, he did not indicate that. The 10:12:49

10 conversation accelerated into, you know, confusion 10:12:53

11 and talking about LG and "life's good," but -- and 10:12:58

12 Life is good. But he did not indicate what made 10:13:02

13 him believe that we made that phone. 10:13:07

14 Q Do you have any procedure for logging any instances 10:13:09

15 of confusion? 10:13:22

16 A We -- the only one I know of is that we alerted 10:13:23

17 customer service, when talking to our retail 10:13:31

18 customers, to indicate or log any instances where 10:13:33

19 the retailers were confused about our association 10:13:41

20 with LG. 10:13:44

21 Q And when did you do that? 10:13:45

22 A I would guess -- I don't know specifically. I 10:13:47

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1 would guess four, five months ago. 10:13:53

2 Q And have you received any reported instances of 10:13:57

3 confusion by virtue of alerting the consumer 10:14:05

4 service -- customer service people? 10:14:14

5 A Yes. But we were surprised at how few. 10:14:15

6 Q And what -- of the few that you did receive, were 10:14:19

7 those in writing? 10:14:29

8 A I'm not certain, but I believe -- I believe some 10:14:31

9 were in e-mail, some were by phone. 10:14:37

10 Q And are there written documents of these? 10:14:41

11 A I'm not certain. 10:14:43

12 MR. SOMMERS: Okay. We would ask that 10:14:49

13 those be produced. 10:14:51

14 MR. KIRBY: I assume, Mark, at the end of 10:14:53

15 the day, you guys will get the transcript and you 10:14:55

16 can send me a nice letter, because I'm a terrible 10:14:58

17 note taker, so I'm not even attempting to take all 10:15:01

18 of these notes down. 10:15:04

19 MR. SOMMERS: Fine. Thank you. 10:15:06

20 THE VIDEOGRAPHER: There's about three 10:15:07

21 minutes left on this tape. 10:15:10

22 MR. SOMMERS: Thank you. 10:15:11

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1 This is the beginning of cassette number 2 in the 10:23:51
2 deposition of Albert Jacobs. We're back on the 10:23:54
3 record. 10:23:56
4 BY MR. SOMMERS: 10:23:57
5 Q Mr. Jacobs, before we went off the record, you had 10:23:57
6 indicated that the retailers, it was your testimony 10:24:00
7 that they were seeking more clarification between 10:24:06
8 the companies than they were confused. My question 10:24:08
9 to you is what makes you believe that this is not 10:24:13
10 also the case of the six instances of alleged other 10:24:20
11 types of public confusion that we talked about 10:24:28
12 earlier today? 10:24:31
13 A What leads me to believe that is the -- the volume 10:24:32
14 of consumer confusion versus the retailer 10:24:37
15 confusion. Again, we were expecting at first a lot 10:24:43
16 more from the retailers; but when we didn't get it, 10:24:50
17 we started looking at why. And so we get a lot 10:24:54
18 more confusion from consumers, many more instances 10:24:57
19 than retailers. 10:25:01
20 Q All right. Have you encountered any -- any 10:25:03
21 instance where a consumer has purchased a product 10:25:06
22 of your company, believing it to, in fact, have 10:25:12

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1 | been 'manufactured by LG? | 10:25:16

2 A I would have no way of knowing that. 10:25:18

3 Q Okay. Have you ever encountered any instance where 10:25:20

4 a consumer has purchased a product of LG,, believing 10:25:28

5 it, in fact, to have been manufactured by your 10:25:34

6 company? 10:25:37

7 A Same answer. I would -- I would have no way of 10:25:37

8 knowing. 10:25:40

9 Q Okay. You have indicated on more -- on -- on more 10:25:41

10 than one occasion that confusion is common. I have 10:25:46

11 asked you to enumerate the instances of confusion. 10:25:52

12 You've given me six. 10:25:58

13 A Yeah. 10:26:00

14 Q You've indicated that there may be more on this 10:26:01

15 e-mail that you prepared. Are there any records or 10:26:04

16 any memoranda memorializing the alleged confusion 10:26:07

17 beyond these six instances? 10:26:13

18 A There may be some. But in most cases, it's 10:26:16

19 | conversations that happen on the street, at a | 10:26:22

20 restaurant, at the movies, which, again, led us to 10:26:25

21 the consumers versus the retailers. So I -- in 10:26:31

22 most cases, people are not making memos out in the 10:26:34

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1 street and -- 10:26:39

2 Q Would it be fair of me to say that the alleged 10:26:42

3 instances of confusion are not occurring in the 10:26:48

4 commercial marketplace and you are encountering 10:26:52

5 these outside a commercial marketplace? 10:26:58

6 MR. KIRBY: Object to the form. 10:27:03

7 BY MR. SOMMERS: 10:27:05

8 Q You can answer if you understand or I'll rephrase 10:27:05

9 the question. 10:27:08

10 A Please rephrase. 10:27:08

11 Q Yeah. Would it be fair for me to say that these 10:27:09

12 alleged instances of confusion are not occurring in 10:27:13

13 a retail marketing context? 10:27:17

14 A No. It wouldn't be fair to assume that. In fact, 10:27:20

15 one of the examples I gave you was in a commercial 10:27:22

16 environment. I've indicated that for us, many more 10:27:26

17 instances are not in the business environment. 10:27:29

18 However, it would be very unfair to assume that 10:27:31

19 they're not happening in a commercial environment. 10:27:34

20 Q Do you know -- do you know whether these people 10:27:37

21 were seeking clarification rather than being 10:27:43

22 confused? 10:27:45

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1 for LG. 10:29:02

2 Q Okay. And are they indicating that they believe 10:29:07

3 that was you? 10:29:11

4 A They're indicating either confusion or that they 10:29:12

5 want clarification, because our company also has 10:29:18

6 the words "Life is good.," which is very similar, 10:29:20

7 and also has a smiley face. 10:29:24

8 Q Okay. I -- I understand that. 10:29:27

9 But are these people indicating that they 10:29:44

10 believe that LG is, in fact, your company? 10:29:47

11 A Sometimes, yes. 10:29:49

12 Q And specifically, who did that? 10:29:50

13 A Specifically, -- 10:29:52

14 Q Who said this? 10:29:55

15 A I think I -- again, I gave you an example of a 10:29:56

16 gentleman who said to me, "Is your company -- are 10:30:00

17 you the guy who owns Life is good.?" And I said, 10:30:03

18 "Yes," and he said, "I have one of your phones." 10:30:06

19 Q Yeah. 10:30:09

20 A So I guess, I -- I don't specifically recollect him 10:30:10

21 after that saying, "Because I saw 'life's good' on 10:30:17

22 this." But I assume if he thinks my company is 10:30:20

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1 Life is good., that that's where it came from. 10:30:23

2 Q So he didn't indicate why? 10:30:26

3 A No, that's not true. He very well may have. It's 10:30:29

4 not the part of the conversation that I remember. 10:30:32

5 Q Okay. Do you specifically recall any other 10:30:33

6 individual, other than this conversation with the 10:30:46

7 gentleman about the phone, who indicated that they 10:30:50

8 believed that LG was, in fact, somehow related to 10:30:59

9 your company? 10:31:04

10 MR. KIRBY: Other than what he's 10:31:05

11 testified about previously this morning, Mark? 10:31:07

12 Because you remember he testified about an air 10:31:10

13 conditioner source of confusion, for example. 10:31:13

14 MR. SOMMERS: You know better than that, 10:31:15

15 Bob. 10:31:18

16 MR. KIRBY: Mark, you don't get to go 10:31:18

17 over his testimony a hundred times, asking him the 10:31:19

18 same thing. 10:31:22

19 MR. SOMMERS: Please. Please, enough. 10:31:23

20 Enough. 10:31:24

21 MR. KIRBY: I'll -- 10:31:24

22 BY MR. SOMMERS:

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1 Is this a new question or the same question? 10:32:11

2 Q Yes, it is. 10:32:11

3 A It's a new question. So you're not asking the -- 10:32:12

4 Q This is a new question. 10:32:16

5 A Okay. Could you restate that question. 10:32:17

6 Q Have you received any misdirected orders, for your 10:32:19

7 company that were intended for LG? 10:32:22

8 A Could you give me an example of what would qualify 10:32:24

9 as a misdirected order? 10:32:28

10 Q Somebody asking to purchase a plasma television. 10:32:30

11 A I don't know of any. 10:32:34

12 Q Have you received any returns of LG products? 10:32:35

13 A I don't know of any. 10:32:39

14 Q Have you received complaints about any LG products? 10:32:41

15 A I don't know of any. It's not to say that the 10:32:51

16 company has not received any, but none has been 10:32:59

17 brought to my attention. 10:33:02

18 Q Do you have a system in place so that the company 10:33:03

19 is notified about those types of events? 10:33:06

20 A When you say "the company is notified," could you 10:33:09

21 clarify what you mean by that? 10:33:12

22 Q I assume that -- that if somebody attempts to 10:33:14

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1 return a product that is not your own, that there 10:33:17
2 is some system in place to notify somebody within 10:33:21
3 the company that that -- that that occurred. 10:33:25
4 A Are you saying that if somebody in customer service 10:33:28
5 receives that, they are somebody in the company, so 10:33:31
6 can you clarify what you mean by somebody in the 10:33:36
7 company? 10:33:38
8 Q All right. Sure. Do you have a -- do you have a 10:33:38
9 policy in place that catalogs or logs or 10:33:42
10 memorializes any occurrence when somebody attempts 10:33:50
11 to return a product to you that is not your own? 10:33:54
12 A I'm not certain, to be honest with you. Operations 10:33:57
13 is really not my forte, so I'm not really certain. 10:34:01
14 Q Okay. Are there any other instances of confusion, 10:34:04
15 to your knowledge, that you have not already 10:34:27
16 discussed with me? 10:34:29
17 A As I stated previously, there's many, many 10:34:31
18 instances, but I -- I can't recall all of them. 10:34:36
19 It's very common for people to make comments which 10:34:40
20 I would classify as either confusion about LG and 10:34:43
21 our company, Life is good., or seeking 10:34:46
22 clarification about whether we're involved with LG, 10:34:49

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1 whether our company is involved with LG. 10:34:55

2 Q And do they indicate the reason why? 10:34:57

3 A Sometimes they very clearly indicate that they've 10:35:00

4 seen advertisements that say "life's good" or say 10:35:04

5 "life's good" and have the LG face. And sometimes 10:35:09

6 they don't, sometimes they just ask the question or 10:35:13

7 -- or state that they're confused about it. 10:35:17

8 Q Okay. And you don't have any of these individuals' 10:35:19

9 names or have any system to record any instances of 10:35:24

10 confusion? 10:35:28

11 A We do. And I've given you some where I've 10:35:29

12 indicated that the individuals who spoke directly 10:35:33

13 to those that were confused or seeking 10:35:38

14 clarification would obtain those names. 10:35:41

15 Q Outside of those, you wouldn't have any specific 10:35:45

16 names? 10:35:48

17 A I think there probably are names and there's 10:35:49

18 probably names I can come up with to clarify or to 10:35:53

19 give specific examples, but off the top of my head, 10:35:57

20 no. 10:36:01

21 Q Okay. Let me have you take a look at the complaint 10:36:01

22 that was filed in this action. 10:37:06

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1 (Proceedings interrupted at 12:33 p.m.
2 and reconvened at 1:46 p.m., at which time Mr. 01:38:22
3 Pierce is no longer present.) 01:38:23
4 THE VIDEOGRAPHER: The time is 1:46. 01:45:02
5 This is the beginning of cassette number 4 in the 01:45:46
6 deposition of Albert Jacobs. We're back on the 01:45:48
7 record. 01:45:51
8 BY MR. SOMMERS: 01:45:51
9 Q Mr. Jacobs, if I could direct your attention to 01:45:52
10 Exhibit 4. And that is the logo with the LG face 01:45:57
11 of the future logo, LG, and the words "life is 01:46:07
12 good." And are you aware of whether that 01:46:10
13 particular logo appears on any of the electronic 01:46:11
14 products that LG produces? 01:46:15
15 A I don't know if it appears on the products. 01:46:18
16 Q Are you aware if it appears on any of their 01:46:21
17 cellular -- cellular phone products? 01:46:25
18 A I'm not. I'm not certain if it does. 01:46:28
19 Q Are you aware if it appears on any of LG's 01:46:31
20 products? 01:46:34
21 A I'm not certain if it does. 01:46:35
22 Q Okay. Have you received any misdirected phone 01:46:40

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| 1 | calls from any member of the public that were | 01:46:49 |
| 2 | intended for LG? | 01:46:53 |
| 3 A | You mean has the company received any? | 01:46:54 |
| 4 Q | Yes. | 01:46:58 |
| 5 A | Not to my knowledge. | 01:46:59 |
| 6 Q | And when I have been using the word "you," I have | 01:47:00 |
| 7 | been referring to you as the company, since you | 01:47:04 |
| 8 | understand you're appearing here on behalf of the | 01:47:07 |
| 9 | company. | 01:47:10 |
| 10 A | I think that's clear. | 01:47:10 |
| 11 Q | Okay. Thank you. | 01:47:12 |
| 12 | You mentioned earlier the company Miller, | 01:47:13 |
| 13 | and I believe you indicated that Miller was using | 01:47:20 |
| 14 | "life is good." Am I correct? | 01:47:25 |
| 15 A | That's right. | 01:47:27 |
| 16 Q | When was that? | 01:47:27 |
| 17 A | Quite a while ago. I -- I'm going to take a wild | 01:47:29 |
| 18 | guess and say it was 1998, 1999. I'm not certain. | 01:47:35 |
| 19 Q | Was it at a time that you were using Life is good.? | 01:47:42 |
| 20 A | Yes. | 01:47:46 |
| 21 Q | Okay. And did you receive an objection from | 01:47:47 |
| 22 | Miller? | 01:47:51 |

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1 to use "life's good" in association with its brand. 03:05:17
2 Q Okay. And am I also correct that you would have no 03:05:20
3 facts to indicate that it did so to trade off your 03:05:25
4 good will? 03:05:29
5 A That's correct. 03:05:30
6 Q Okay. Or trade off the selling power of your 03:05:31
7 company? 03:05:34
8 A Yeah. I have no idea why. 03:05:35
9 Q Okay. Or that it did so for purposes of boosting 03:05:38
10 its own sales? 03:05:51
11 A I -- I would -- I would venture to guess that they 03:05:52
12 created that in hopes of boosting their sales, 03:05:55
13 certainly. 03:06:01
14 Q I guess I meant off the backs of your hard labor. 03:06:01
15 A Off the backs of -- yeah, I would have no facts or 03:06:04
16 ideas to indicate that they did so to -- to benefit 03:06:07
17 off of our -- our brand. 03:06:11
18 Q Mr. Jacobs, can you tell me, have -- has your 03:06:13
19 company lost any customers or sales or business as 03:06:36
20 a result of LG's use of the "life is good" -- 03:06:48
21 "life's good" tag line? 03:06:55
22 A I would have no way of knowing. 03:07:04

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1 "life's good"? 03:45:43

2 A I don't think so. 03:45:44

3 Q I'd have the same question for the Jake symbol? 03:45:46

4 A I don't think so. 03:45:53

5 Q Finally, I'd have the same question for the LG 03:45:54

6 logo? 03:45:59

7 A I don't think so. 03:46:00

8 Q What was your company's first knowledge of LG's use 03:46:01

9 of the words "life's good"? 03:46:30

10 A I can't speak for the company. Personally, I don't 03:46:32

11 remember the first call or e-mail, but probably in 03:46:44

12 the neighborhood of a year and a half to two years 03:46:49

13 ago, a handful of people inside the business and 03:46:53

14 outside the business contacted me and said, "Hey, 03:46:56

15 have you seen this ad" and "I got this in the 03:47:00

16 newspaper" and you know, the kind of questions that 03:47:03

17 we talked about earlier, and you know, looking for 03:47:06

18 a clarification about whether we were involved or 03:47:12

19 not started coming in. 03:47:15

20 I also remember there was a friend in -- 03:47:17

21 in -- out in LA who saw "life's good" up on the 03:47:20

22 Sonitron hanging above the basketball stadium and 03:47:28

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1 called on the cell phone and said, "Hey, you know, 03:47:35
2 is this you guys? What is this all about?" So -- 03:47:38
3 Q Anything else? 03:47:45
4 A Again, those are examples of how we heard about it, 03:47:46
5 but by no means a complete list. 03:47:55
6 Q When was the first time you were aware of the -- 03:47:58
7 the -- the LG face of the future logo? 03:48:03
8 MR. KIRBY: By that name or just the 03:48:12
9 logo? 03:48:15
10 MR. SOMMERS: Just the logo. 03:48:16
11 THE WITNESS: Yeah. I think shortly 03:48:18
12 thereafter. Two years ago to a year and a half 03:48:20
13 ago, I think we started paying attention to LG when 03:48:25
14 we heard they were using "life's good" and 03:48:28
15 certainly went to the web site and saw that they 03:48:31
16 also had a face. 03:48:35
17 BY MR. SOMMERS: 03:48:36
18 Q Let me ask it again. When was the first time you 03:48:36
19 saw the logo that is depicted as Exhibit 3? 03:48:40
20 A Now, by that question, do you mean the face next to 03:48:43
21 the LG or do you mean just the -- the LG smiley 03:48:50
22 face, the face of the future? 03:48:53

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